

Metropolitan Life Insurance Company and Carolyn Kugel and Insurance Workers International Union, AFL-CIO, Petitioner. Cases 22-CA-9690 and 22-RC-8051

June 17, 1981

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

On February 9, 1981, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Metropolitan Life Insurance Company, Secaucus, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election conducted on December 21, 1979, in Case 22-RC-8051 be set aside and said case hereby is remanded to the Regional Director for Region 22 for the purpose of conducting a second election at such time as he deems appropriate.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Because Respondent's asserted lawful reason for the discharge of Carolyn Kugel is plainly pretextual, as the Administrative Law Judge found, Member Jenkins considers his further reliance on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), to be unnecessary, though it does not invalidate his conclusion.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: These consolidated cases were heard before me in Newark, New Jersey, on June 9 and 10, 1980.

On November 8, 1979,¹ the Insurance Workers International Union, AFL-CIO, herein called the Union, filed

a petition in Case 22-RC-8051, seeking to represent certain of the employees of Metropolitan Life Insurance Company, herein called Respondent. On November 21, a Stipulation for Certification Upon Consent Election was approved by the Regional Director for Region 22, providing for an election to be held on December 21, among Respondent's sales representatives employed at its Hudson District sales office located in Secaucus, New Jersey. The tally of ballots issued on that date, disclosed that of eleven eligible voters, three cast ballots for the Union, four against, one void ballot and one challenge. Thus, a majority of valid votes counted were not cast for the Union. Thereafter, the Union filed timely objections to the conduct of the election.

On January 8, 1980, Carolyn Kugel, an individual, filed a charge in Case 22-CA-9690, alleging, *inter alia*, that she was terminated by Respondent because of her membership and activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act.

On January 30, 1980, the Regional Director issued a Report on Objections, finding that the objections filed by the Union raise factual and material issues which may best be resolved by a hearing. The issues specified by the Regional Director, included allegations that Respondent threatened employees with discharge, and discharged an employee because of her activities on behalf of the Union, interrogated employees concerning their union sympathies, created the impression of surveillance, made implied promises of benefit, and threatened employees with reprisals should they support the Union.

On February 8, 1980, an order consolidating cases, complaint and notice of hearing was issued. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging and refusing to reinstate Kugel because of her union activities. Additionally, the complaint alleges that Respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning their union sympathies; creating the impression among its employees that their union activities were kept under surveillance by Respondent; instructing an employee not to sign a union authorization card or otherwise assist the Union; warning its employees that they would suffer economic or other unspecified reprisals if they became or remained members of the Union; and by offering and promising its employees benefits or improvements in their terms and conditions of employment to refrain from becoming or remaining members of the Union or giving any assistance or support to it.

The Union did not make a formal appearance at the hearing, nor did it otherwise participate in the conduct of the hearing. Briefs were filed by the General Counsel and Respondent and have been duly considered. Based on the entire record,² and my observation of the demeanor of the witnesses, I make the following:

¹ All dates are in 1979, unless otherwise stated.

² Certain errors in the transcript are hereby noted and corrected.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, is engaged in the sale and issuance of life and health insurance policies and related services, with its principal place of business at One Madison Avenue, New York, New York, herein called the Home Office, and a district sales office located in Secaucus, New Jersey, herein called the Hudson District Office or the District Office. During the past year, Respondent received from policyholders, insurance premiums valued in excess of \$500,000 of which in excess of \$50,000 represented premiums received from policyholders located outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

As noted, Respondent's Home Office is located in New York, New York. Respondent also divides its operations into 40 regional offices, further subdivided into 720 district offices. The New Jersey Regional Office, located in Secaucus, New Jersey, has jurisdiction over 19 district sales offices, including the Hudson District Office involved in the instant proceeding, also located in Secaucus, New Jersey.³

The regional sales manager, Irving Katz, is in overall charge of the Region, which encompasses 475 sales persons. He is assisted by Louise Walsh, regional supervisor and his chief administrative assistant. The regional office also employs a regional analyst, and two secretaries.

The Hudson District Office is staffed by 10 sales representatives, 14 sales agents,⁴ an office manager, assistant office manager, and 3 clerks, with supervision by James Leone, district sales manager, and three sales managers, each of whom supervises a unit of approximately 7 sales personnel.⁵ After a sales representative successfully persuades an applicant to purchase insurance from Respondent, a written application is submitted to the District Office for approval and review. After approval by the District Office, the policy is forwarded to the Home Office in New York, where it is reviewed by the underwriting department. If the policy is approved, it is issued and returned to the District Office for presentation to the policyholder. During the period of time that the policy is being processed by the Home Office, the policy is considered "in the mill."

The sales representative then presents the policy to the policyholder and collects the first premium. During the period of time from the time the policy is approved by the Home Office until the sales representative collects the premium, the policy is considered "on hand." Once

the premium is collected, the policyholder becomes insured, and the policy is considered "placed."⁶

The sales representative, however, is not "credited" with the commission earned on such a policy until the transaction physically appears on a computerized "1960 Summary Sheet," which is issued weekly. This sheet is prepared by the Home Office, and it generally takes from 1 to 2 weeks from the date the policy is placed for the policy to appear on the 1960 sheet, and be officially credited to the sales representative's account and his commission pool.

All sales representatives appointed in 1979 were hired under the terms of Respondent's 1975 financing plan. Under this plan an employee must fulfill a probationary requirement of having \$2,100 in commissions credited during the first 6 months of employment. This is known as the validation period. If a sales representative fails to attain the minimum \$2,100 in commissions, termination is required except for "unusual circumstances"⁷ where the district sales manager and the regional sales manager may approve the employee's continuance for a third fiscal period. The plan further provides that once an individual is approved for this type of continuance, he must obtain \$3,150 in commissions by the end of the third fiscal period.⁸ If this requirement is not met, the plan states that "termination is mandatory; there are no exceptions."

Respondent's financing plan also provides as follows:

II. B. 3 Sales Representatives who do not meet production requirements because of errors or delays in commission crediting—there are times when an individual does not meet the probationary requirement at the end of the second fiscal period or the reinstatement requirement by the end of the third fiscal period because of an error or delay in the crediting of commissions. It is extremely important that you report such a problem immediately so that the necessary correction can be made quickly. The longer it takes to report an error or delay and arrange for a correction, the longer the individual's compensation will be adversely affected and the higher the risk of the individual's terminating before a correction is made.⁹

Respondent's procedures with respect to such terminations are generally initiated by the Home Office notifying the regional office, 2 weeks prior to the end of his probationary period, that said individual will not meet his \$2,100 commission requirement. The regional office then contacts the District Office to ascertain whether there

³ The record does not establish whether the regional and district offices, involved herein located in Secaucus, New Jersey, are in the same building.

⁴ Both sales agents and sales representatives solicit and sell life and health insurance. Agents, however, have the added responsibility of servicing and collecting insurance premiums on policies within their district.

⁵ It is admitted by Respondent that the district sales manager and the sales managers are supervisors within the meaning of the Act.

⁶ If the policyholder had submitted 10 percent of the annual premium at the time the application was completed, the policy "places" when approved by the Home Office. Thus, there is no intervening "on hand" period in such circumstances.

⁷ "Unusual circumstances" is not defined in the financing plan.

⁸ Although not specifically defined in the plan, it is clear that the fiscal period encompasses 13 weeks.

⁹ Although both Katz and Walsh testified at length with respect to the meaning of the term "delay in commission crediting," to be discussed more fully *infra*, it is undisputed that this term is not defined in any document of Respondent, and that they had never been involved in a situation which encompassed this type of delay.

are any extenuating circumstances, warranting retention of the salesperson. A recommendation is then made in writing by the district sales manager to the regional office, recommending retention (if he believes such retention is justified), setting forth the extenuating circumstances, which in his judgment warrants the individual's continuation of employment. These recommendations are generally followed by the regional office. Those individuals who are retained for the third quarter must execute form 35-0, which sets forth *inter alia*, that the failure to obtain \$3,150 in net production credits¹⁰ by the end of the third fiscal period will result in termination.

Two to three weeks before the end of the third fiscal period, again the Home Office will notify the regional office about a potential failure to obtain \$3,150, and again the regional office will ascertain from the District Office whether there are any extenuating circumstances which might affect the employee's validation. If there are none the sales representative will be terminated.

Respondent's normal practice in the case of terminations for failure to meet validation requirements is to give employees 2 weeks' notice of their discharge, except in unusual circumstances in which a district sales manager may feel that a particular sales representative would be a disruptive or negative influence. The record discloses that the only two employees discharged from the Hudson District by Respondent for failure to validate since January 1978, were given 2 weeks' notice of their discharge.¹¹

As noted above, Respondent employs two types of sales employees, representatives and agents. Respondent's sales agents employed in its New Jersey District offices have been represented by the Union since 1971. A contract is in existence between the parties pertaining to these employees, running from November 3, 1978, to March 31, 1981. Sales representatives employed by Respondent at the Hudson District have never been represented by a labor organization.

In Case 22-RC-7682, a petition was filed by the Union on October 13, 1978. Pursuant thereto, an election was held on November 17, 1978, involving all sales representatives at Respondent's Hudson District office in Secaucus. The record does not reflect the results of the election, but since it is admitted that the sales representatives are not and have not been represented by a Union, it is assumed that the Union was unsuccessful in that election.

During the months of January through June 1979, Leone held weekly meetings with his sales managers, Vincent Rappa, Bill Sweeney, Gene Parsons, and John Gil. On frequent occasions during these meetings the

subject of the Union would arise. Leone at various times during this period, stated that it was his objective to eliminate the union people and have the office made up entirely of sales representatives. Leone expressed a fear that the Union would take over the office and upset the balance between union and nonunion employees. He added that the agents (employees represented by the Union) were second rate sales people and were "deadwood." On many occasions he mentioned that he felt that there was a personal vendetta between the Union and the district office. In this connection, while discussing a pending union grievance, Leone on one occasion ventured the comment that they might find the body of Fiore Paluscio floating in the river.¹² At another meeting Leone informed Rappa that Marty Milstein, another union representative, was a nice fellow and a gentleman, but could not be trusted because he was part of the Union.¹³

Carolyn Kugel was hired as a sales representative in Respondent's Hudson District Office on February 5, 1979. She was supervised by Sales Managers Rappa and Gil during the course of her employment with Respondent. She was frequently complimented by these supervisors, as well as by Leone throughout her employment, as having great ability as a successful sales representative. She was also referred to by Leone as a "superstar," and told by Gil that she might be eligible for leaders conference.¹⁴

Her second fiscal period ended on August 3.¹⁵ She did not meet the \$2,100 first-year commission requirement at that time. Acting District Sales Manager Eugene Parsons and Leone discussed whether or not to recommend Kugel's retention.¹⁶ Gil had previously recommended her retention and Leone and Parsons concurred. Accordingly, Leone instructed Parsons to prepare a letter to Katz recommending that Kugel be continued as a sales

¹² Paluscio is a union representative as well as a sales agent employed by Respondent.

¹³ The above findings are based on the credited testimony of former Sales Manager Rappa. Based on comparative demeanor considerations, I find his testimony to be more believable than the testimony of Leone and Gil that these remarks of Leone were not made. I also rely on my assessment of the inherent improbability of the testimony of Respondent's witnesses that neither the Union's possible representation of the sales representatives, nor the various elections held involving the Union, nor any pending grievances were ever discussed at any management meetings by Leone. Both Leone and Gil did admit, however, that Leone did discuss a plan decided on by Respondent to phase out all sales agents when the union contract expires in 1981, and shift them to sales representative positions. According to Gil, he received a letter from Respondent's vice president stating that this action would result in the Union being disbanded.

¹⁴ Leaders conference is an award given to employees who achieve a certain level of productivity.

¹⁵ Gil testified that her normal 26-week fiscal period was extended to 1 week, due to her being out of work for 3 weeks on disability during this period of time. It should be noted that the 1975 financing plan makes no provision for extending the validation period because of an employee being out of work for any period of time.

¹⁶ Leone was on disability from June 10 to December 10, during which time Sales Manager Parsons served as acting district sales manager. During this period of time, Leone kept apprised of activities in the district by phone. From October to December Leone visited the office personally on several occasions and conducted a couple of sales meetings with employees.

¹⁰ Net production credits are synonymous with credited commissions.

¹¹ Employee Paul Geberbaum was hired on June 27, 1977, failed to validate within the first 6 months of employment and was notified by letter dated December 23, 1977, that he was being discharged effective January 6, 1978. Bernard Bateman was hired on May 8, 1978, and was notified by letter dated December 14, 1978, that he was being terminated effective December 28, 1978. The record also revealed that a recommendation to retain Bateman was submitted by the district sales manager and that Bateman was offered an extension of his validation into his third fiscal period, but that he refused to sign Respondent's memo form 35-0. Therefore he was terminated, and he as well as Geberbaum worked the 2 weeks preceding the effective dates of their termination.

representative. The letter, dated August 17, recommended continuance of Kugel for the following reasons:

Her inventory reads as follows:

Placed	\$1,863
Placed not Credited	110
On Hand	0
Mill	1,522
Total	\$3,496

In addition Mrs. Kugel also had a Ten Day Free Look reversal for \$2800. which would have more than validated her. She is a consistent and hard working individual with great potential.

Katz testified that based on this recommendation, he decided to grant the request to retain Kugel. On the bottom of the letter sent by Parsons, handwritten comments dated August 21, 1979, state, "issue Form 35-0 for continuance into 3rd fiscal period." The signature appears to read B. Dobbs.¹⁷

Pursuant thereto Kugel was notified by Parsons of her continuance, and she was given form 35-0 to execute which she did on August 28, 1979. The form stated that she has failed to meet her production requirements, and that she was being continued as a sales representative with the understanding that failure to attain the net production requirement by the end of the third fiscal period will result in her termination from company service.

Sometime during the first week of October, Kugel was approached in the coffeeroom at Respondent's Hudson District Office by Fiore Paluscio, noted as an official of the Union, as well as an insurance agent employed by Respondent. Paluscio gave her an authorization card in an envelope and asked her if she would sign it. She replied that she would consider it.

On October 10, at noon, Kugel informed Gil that she was going out to lunch and would be back in an hour. Gil asked her with whom, and she replied that she would be having lunch with "Fiore and some of the boys." Gil then said to her, "Don't sign anything, don't sign a union card. Don't give them anything." At that point, Gil asked Leone to come into his office and closed the door, with Kugel still in the room. Gil said to Leone, "Do you know who she's going out to lunch with?" Leone replied, "No, who?" Gil then informed Leone that she was going with "Fiore and some of the boys." Leone then asked, "What do you want to go out to lunch with them for?" Kugel replied that it was a previous engagement. Leone then asked her to see them when she returned, and let them know what was said.

Kugel then left the office and followed Paluscio in her car to a restaurant. In the parking lot of the restaurant she gave Paluscio her card, signed and dated October 10.

Kugel returned to the office at 1:15 p.m. Gil called her into his office and asked her to close the door. He asked her, "Did you sign?" She said, "No, I did not sign." Gil then asked if they asked her to sign and she replied yes, but that she told them that she was not going to sign. Gil then proceeded to tell her how the Union had ruined Hudson District, and how they were all a bunch of passe

insurance men and that they had done nothing good for Hudson District. She again repeated that she did not sign a card. He replied that he would be able to find out whether or not she had signed a card and that he hoped that she was telling the truth. At that point Kugel left the office.

The next morning Gil called her into his office and closed the door. He said to her that he knew that she had signed a card. She repeated that she did not. He told her that his sources were reliable and that this was her last and final chance. He added that he would get to see the card and that if she did not tell him here and now, that she "would never write another stick of business" and that he would bury her. Kugel then left the office.

About an hour later, Leone asked her to come into his office. Kugel followed him into his office and he closed the drapes and the door. He said to her, "I thought you weren't going to sign." Kugel answered that she did not sign anything. Leone responded, "Well, we have information to the contrary." She asked what his information was, and he informed her that Marlin Rowland had seen her hand a card to Paluscio.¹⁸ Kugel explained to Leone that what she (Rowland) had seen her (Kugel) give Paluscio was a piece of paper with her home phone number on it. Leone asked her a few more times if she had signed and she said no. Leone then asked her who was at the luncheon and what was said by each one of the people present. She proceeded to inform Leone of what was said by each of the agents, and he asked her to please let him know if she was approached again.¹⁹

Sometime in mid-October, Leone had a sales meeting at the office with Sales Representatives Kugel, Joseph Tomasetti, Dennis Kirk, and Gil. During the course of this meeting, Leone told Kugel that she would be the next superstar; that Tomasetti, Kirk, and Kugel all had a

¹⁸ Rowland, a sales representative, testified credibly, without contradiction, that sometime in October in the course of a conversation with Sales Manager Parsons, she told him that she had seen what appeared to be Kugel signing a union card. She added that she believed it was going to be a close fight, that it seemed that there were other sales representatives lining up on the union side. Parsons made no comments to her pertaining to these matters.

¹⁹ The above findings concerning Kugel's conversations with Gil and Leone are based on the forthright and candid testimony of Kugel. Gil and Leone denied making any of the comments attributed to them by Kugel, and testified that Kugel in fact approached them and volunteered the information that she was going to lunch with Paluscio; that she wanted to find out what he had to say; and that she offered to be "liaison" between Respondent and the Union, and to inform Respondent of what the Union had to say. In addition to demeanor considerations, I find Kugel's testimony to be more believable than that of Gil and Leone, for a number of other reasons. Significantly, the prehearing affidavits of both Leone and Gil contain no reference to Kugel's alleged offer to be a liaison between Respondent and the Union or to inform Respondent of what the Union had to say. Additionally, Gil's testimony on direct examination also failed to mention Kugel's alleged offer in this regard. Finally, I also rely on Rowland's undenied testimony that she told Sales Manager Parsons that she had seen Kugel sign what appeared to be a union card. This tends to support Kugel's testimony that Leone informed her of Rowland's report to Respondent concerning her union activities. Accordingly, based on the above, I credit Kugel as to these conversations as well as in other areas where her testimony differs from that of Gil or Leone, as outlined below.

¹⁷ Bill Dobbs is Walsh's assistant.

chance to make leaders conference; and that he considered them the best staff in the office.²⁰

The last day of Kugel's third fiscal period was October 29, but she did not have \$3,150 in commissions credited on this date. Gil received her 1960 summary which covers this period of time, in early November, and it revealed that she had \$2,799.48 in credited commissions. Gil informed Kugel at that time that she had not obtained the \$3,150. Kugel asked what could she do. Gil testified that he then said he would try to expedite some of her cases which were in process. He called the underwriting department and tried to expedite processing some of these cases. He said nothing to Kugel at this time about her being terminated or even the possibility of such action. Gil testified that he assumed that Kugel would be able to validate by virtue of the cases that she had in process, and that Respondent would be able to retain her in view of same. Parsons, the acting sales manager, asked Gil if Kugel had reached her \$3,150, and he told him that she had not. Parsons said nothing to Gil about the possibility of Kugel being discharged, and Gil did not ask him. Gil testified that he did not check the 1975 financing plan to see if it was necessary to discharge Kugel. He further testified that he had never experienced a situation similar to Kugel's, and that although he had attended training seminars for sales managers, for 9 weeks, the subject of the validation requirement and its application beyond the third period never came up.

Sometime later in November, Gil met with Kugel and discussed her obtaining her training allowance. At this time he told her that she needed \$900 in commissions to requalify for training allowance.²¹ Again Gil said nothing to Kugel about the possibility of her being terminated, and in fact suggested to her that she might become eligible for leaders conference, if a couple of her current cases resulted in final acceptance.

As noted, Leone testified that he was confident that Kugel would validate when he reviewed her inventory, and he further testified that he made no subsequent effort to inquire whether or not she had done so.

Sometime in late November, a sales meeting was held in the Hudson District Office. Present were Kugel, Tomasetti, Kirk, and Gil. During the course of the sales meeting, Gil stated that he was not going to have any betrayers on his staff, and that he was tired of all the time being wasted on the Union. He added that no one on his staff would vote for the Union.²²

²⁰ Leone testified that at that time, a couple of weeks before Kugel's validation period was to expire, he reviewed her inventory and it seemed to him that she would have no problem in validating or reaching the \$3,150 figure as scheduled.

²¹ To receive a training allowance in addition to obtaining \$3,150 in commissions, it is also necessary to achieve \$1,000 in a sales representative's moving average account.

²² Based on the essentially mutually corroborative testimony of Kugel and Tomasetti, which I credit over the denials of Gil. As explicated above, I have credited Kugel where her testimony conflicts with the testimony of Gil. In addition I found Tomasetti to be a believable witness, and I credit his testimony with respect to this conversation as well as other conversations set forth below, as against the denials of Gil.

As noted above, the Union filed its petition on November 9, and an election was conducted on December 21.²³

During the first week of December, Gil and Kugel had lunch together. Gil told Kugel that he knew that Dennis Kirk was the instigator among the representatives and that he now knew that Kirk was not going to vote for the Union, because he, Gil had saved Kirk's neck with some business in the office. Gil added that Kirk's job was at stake and that not only would Kirk not vote for the Union, but no one on his staff would vote for the Union. During this conversation Gil also stated that he saw no reason why Kugel would not make leaders conference and that she was a good insurance salesperson.

Around the same time, Kugel in Gil's office again asked Gil how much she would need at that time to get back her training allowance. Gil told her the figure was still \$900, and added that she was going according to schedule and he felt that she would make it. Gil added that only he and Leone would help her and that no one else, especially the Union could assist her. Gil assured Kugel that she would make it if she stuck with him and not with them.

Sometime during the first week in December, Tomasetti was called into Gil's office. Gil asked him if he had signed a card and Tomasetti replied that he had not. Gil asked Tomasetti who signed cards and who was going to vote for the Union. Tomasetti replied that Kirk, Kugel, and Max Ugarte had signed union cards, and these employees plus employees Armando Mirante and John Kuritis would be voting for the Union. Gil answered that Tomasetti was close.

Approximately 2 weeks before the election, Tomasetti was again called into Gil's office. Gil asked Tomasetti if he was loyal to him, and Tomasetti asked what Gil meant. Gil asked what Tomasetti would do if he was asked to vote for the Union. Tomasetti asked what did being loyal to Gil have to do with voting for the Union. Gil replied that he had a lot of support in the district and amongst union representatives. He added he would be able to make certain moves and become district manager and would take Tomasetti under his wing and make him sales manager. Tomasetti responded that he would vote yes if it would make Gil happy. Gil then told Tomasetti to vote no until further notice. They had no further conversations with respect to this subject.

Tomasetti also discussed the Union with Leone during a conversation about Tomasetti's chances of making leaders conference. Leone asked Tomasetti if he had his support with respect to the union election. Tomasetti replied yes, he had his support, and not to worry about it. During this same conversation Leone stated that the insurance agents were a waste of time, and were only taking up space.²⁴

²³ On November 21, a stipulation for certification was approved by the Regional Director providing for such election.

²⁴ Based on the credited testimony of Tomasetti. In addition to comparative demeanor considerations, I also rely on my findings set forth above, that Leone made similar statements about sales agents at sales meetings, in crediting Tomasetti's testimony over Leone's denials.

Armando Mirante was called into Parsons' office in early December and was asked to submit his resignation immediately, as another employee was going to take over his accounts.²⁵ After this conversation, another employee told Mirante that he felt that Respondent was trying to get him to resign before the union election. Thereupon, Mirante confronted Parsons and asked him if Respondent was trying to get him out due to the election. Parsons assured him that this was not the case.

In the second week of December, Leone called Mirante into his office and asked what had happened between him and Parsons. Mirante replied that he thought that Parsons' request for his resignation was because of the pending election. Leone told him that there was no truth in that, and added that if he wanted to stay until the end of the year he could do so. During the course of this conversation, Leone asked Mirante if it would really be fair for him to vote in the election, since he was going to leave Respondent a week or two later. Mirante after thinking about it said that he was going to remain neutral in the election.²⁶ In fact, Mirante did not vote in the election conducted on December 21.²⁷

On Friday, December 7, Kugel and Gil reviewed and discussed her 1960 summary sheet, dated November 28. Kugel commented to Gil that there were five cases that she had written and deposited moneys on 10 days before that should have been credited to her account.²⁸ Gil responded that he would make some calls and find out if he could expedite some of this business. Nothing was said to Kugel at this time by Gil about her being terminated.

On December 14, Leone asked Kugel to come into his office. He notified her that Katz had ordered him to terminate her immediately for failure to validate. Kugel noted that at that time, she had \$977 in commissions placed but not credited to her account and asked whether this had been considered. Leone replied that there was nothing he could do and that she was terminated. Kugel asked if he could make some calls to verify that the premiums had placed on the policies that she had mentioned. Leone replied that he could not do that. Kugel added that she also had two large cases of \$100,000 and \$200,000 where the policies were written and were pending medical examinations, and she needed a few days to consolidate her case. Leone repeated that there was

nothing he could do and that she was to wait for her termination letter.

Leone also told her that he felt bad about having to terminate her and that he had made every effort to try to retain her employment. He also offered to give her a reference.

While waiting for her termination letter, Gil called her into his office. He told her that he did not know what to say and that nothing like this ever happened to him before. He added that he never had a sales representative terminated with a \$100,000 case in the mill. She asked if there was anything he could do, and he replied that he could do nothing.

At 4 p.m. Kugel was given her termination letter, dated December 14. The letter, signed by Leone, states that since she has not met her production requirements, she is hereby terminated effective December 14. She was told by Leone not to return to the office.

As noted above, Respondent's normal practice is to give an employee 2 weeks' notice of their discharge for failure to meet production requirements. It is admitted by Leone that Respondent prefers that employees give 2 weeks' notice of their intention to resign and that it is important for Respondent to have pending business completed before a sales representative leaves.

Respondent's position with respect to Kugel's discharge as testified to by Katz and Walsh, is that Kugel was terminated solely for failure to meet her production requirements. Walsh testified that she was out on disability from September 28 to early December 1979. She added that Kugel should have been terminated on October 29, when her third fiscal period expired without her having met her \$3,150 commission requirements. However, she claims that she was out on disability on October 29 and that no one in her office noticed Kugel's failure to validate.

When Walsh resumed work on December 3, she testified that she received a correspondence from the Home Office. The correspondence consisted of a letter from R.W. Weber, assistant vice president, stating that Kugel at the end of her third fiscal period attained \$2,799.48 net production credits, and therefore failed to meet her reinstatement requirement of \$3,150 credits. The letter added that according to our records, as of November 7, Kugel was still employed, and concludes by asking, "please inform us what action will be taken regarding this situation." Attached to this letter was a termination form, signed by a clerical employee, asking to advise termination date for Kugel, "per attached memo from Asst. V.P. Weber."

Upon receipt of these documents Walsh contacted Leone to discuss Kugel's situation. She notified Leone that Kugel had not validated and would have to be terminated. Leone asked if there was anything that could be done. Walsh asked if there were any extenuating circumstances in Kugel's case. Walsh did not state nor did Leone ask what would constitute "extenuating circumstances." Leone advised Walsh that at that time she had commissions placed but not credited, which would bring her in excess of \$3,150, which would be disclosed on the

²⁵ Mirante had previously notified Respondent that he intended to resign to go into another business. Leone, in October, told Mirante that he could stay until the end of the year or until the business was ready, whichever came first.

²⁶ Mirante testified that until Leone brought it up, he never considered not voting in the election.

²⁷ The above findings are based on the candid testimony of Mirante, which I credit. Leone recalls the conversation, but testified that the discussion was initiated by Mirante and that he (Mirante) brought up the subject of the election and told Leone that he did not think it was fair for him to vote, and solicited Leone's opinion. Leone contends that he replied that he could not comment and it was entirely up to Mirante. I found Mirante to be a more impressive witness than Leone, based on demeanor, as well as the factors discussed above with respect to my reasons for discrediting Leone where his testimony conflicted with the credited testimony of other witnesses.

²⁸ These five cases, if they had appeared on her summary would have given her \$550 in commissions, which would have brought her account to in excess of \$3,150 in commissions for the year.

next 1960 summary sheet.²⁹ Walsh asked whether any of the business could be set back to the third fiscal period, because of some unusual delay. Leone replied that he would find out. Leone also reminded Walsh of the fact that he felt Kugel had validated during the second fiscal period. Walsh said that Leone was wrong since during this period a policyholder exercised a 10-day free look and had canceled a policy, thereby depriving her of reaching her \$2,100 credits. Walsh told Leone to put all these matters which he believed to be extenuating circumstances into a letter and send it to Katz.³⁰

Leone sent a letter to Katz, dated December 6, reading as follows:

RE: Carolyn Kugel—Validation

Dear Mr. Katz:

We have an unusual situation and I hope that you can approve Mrs. Kugel continuing as a sales representative.

Her official record at the time of the expiration of her validation period was below the amount required. However, she was validated on June 18, 1979 when a case was placed for \$2,799.72 F.Y.C. but because of an omission on the application of an incident that had transpired in the past the insured's attorney returned the policy to our office with a request for a return of prem.

The sales manager at the time went to see the insured but was refused any time to converse as the insured and his attorney felt that the omission [sic] was done purposely. The sales manager at the time of the writing, Mr. Vincent Rappa, who completed the application is no longer in our employ.

This hurt her as well and since then we have been trying to help her as much as we can. I feel that with a little patience we can help her to be successful. Her present inventory is as follows.

Placed	\$2,724
Placed Not Credited	682
On Hand	447
Mill	1,488
Total	\$5,341

I would appreciate any help that you can give us. I was on disability at the time of the unfortunate incident and perhaps if I had been here I could have averted the cancellation.

²⁹ In fact the 1960 summary sheet, covering the week of December 3 to 10, which according to Gil was received in Respondent's district office on December 17, revealed credited commissions of \$3,291.06.

³⁰ The above is based on a composite of the testimony of Walsh and Leone. I reject and discredit their further testimony that Leone told Walsh that in his view another extenuating circumstance would be that he felt that Kugel was a sure vote for Respondent in the upcoming election. I find that Leone could not have made such a statement in view of my findings above, that by this time, Respondent was aware that Kugel intended to vote for the Union. In addition, Leone failed to include in his pre-hearing affidavit this alleged comment. Finally, in his memo to Katz, to be discussed *infra*, wherein he outlines what he viewed as extenuating circumstances justifying Kugel's retention, no mention is made of his alleged opinion that she would vote for Respondent.

Upon receiving this letter Walsh went to speak to Katz. She informed Katz that Respondent's procedures provide that Kugel should have been terminated at the end of her third fiscal period (Oct. 29), unless there were extenuating circumstances. They discussed Leone's letter and concluded that there was no extenuating circumstances present justifying retention. Accordingly, termination was decided on.³¹

Katz and Walsh testified that the only extenuating circumstance which would justify an extension is an unusual clerical delay in processing the policy.³² It is undisputed however that neither Katz nor Walsh had ever dealt with such a situation before, and that no document of Respondent defines extenuating circumstances, or any examples of same. It is also admitted by Walsh and Katz that no document of Respondent indicates whether commissions placed but not credited can be considered in evaluating whether extenuating circumstances are present. Yet they both categorically insist that these commissions can only be considered as extenuating circumstances for the purposes of extending the second but not the third fiscal period.³³

Katz testified further that he conferred with legal counsel in view of Respondent's alleged error in permitting Kugel to remain well into her fourth period. He further contends that if she had validated as of the date of his consideration of the matter, he would not have terminated her and would have consulted his superiors to see if an exception could be made. Based on his discussion with counsel, he decided to reaffirm his decision to terminate her and ordered her terminated immediately without any notice.³⁴ The reason for deviating from Respondent's normal procedure of giving 2 weeks' notice, was according to Katz, because so much time had elapsed since her third period had expired, and this was an unusual situation of Kugel having been permitted to work well into the fourth quarter. He added that there was no chance to reverse the decision, so he felt it was better to "do it as swiftly as possible."

III. ANALYSIS

A. 8(a)(1) Allegations

Respondent committed unlawful coercive interrogations in violation of Section 8(a)(1) of the Act, by Gil and Leone asking Kugel if she signed cards for the Union, if the Union asked her to sign such cards, and

³¹ I again discredit the testimony of Katz and Walsh insofar as they claim that Walsh told him that Kugel was a company vote in the election. I rely on the reasons set forth in the preceding footnote, as well as the fact that Katz' pre-hearing affidavit makes no mention of this significant matter.

³² In this connection it is noted that neither Leone, Katz, nor Walsh made any effort to contact the Home Office to see if there were any "unusual" clerical delays in connection with the processing of any of Kugel's policies.

³³ Katz conceded that "not a heck of a lot" of commissions placed by a sales representative are not eventually credited, and that crediting is purely a clerical matter. Notwithstanding the fact that the financing plan does not state that all commissions must be officially placed to be considered, Katz insisted that he had no discretion in this matter, and that even if Kugel had placed \$1 million in commissions, if they had not been officially credited to her account, she would still have been terminated.

³⁴ Kugel was given 2 weeks' pay in lieu of notice.

who attended the union meeting and what was said there. In addition, Gil's questioning of Tomasetti whether he signed a card and Leone asking Tomasetti if he (Leone) could count on Tomasetti's support in the pending election, also constitute unlawful interrogations.

It is also my conclusion that Leone's asking Mirante if it would be really fair for him to vote in the election, in view of the fact that he intended to leave shortly, is also violative of the Act. Such a question, coming a week before the election, to an employee known by Respondent to be a union supporter,³⁵ in the context of Leone permitting Mirante to remain employed by Respondent until the end of the year, contrary to Parsons' previous instructions, coerced Mirante in the exercise of his Section 7 rights.³⁶

The statements made by Gil and Leone to Kugel that Respondent would be able to find out whether she signed a card, that they knew and/or had information that she did sign a card, and that they knew that employee Kirk had instigated the Union, would reasonably lead employees to believe that their union activities had been placed under surveillance by Respondent in violation of Section 8(a)(1) of the Act.³⁷

I have found that after Tomasetti informed Gil who he believed had signed cards and was going to vote for the Union, Gil made the comment that Tomasetti was close in his opinions on these matters. I find that this remark by Gil would also reasonably lead Tomasetti to believe that Respondent had placed the union activities of its employees under surveillance, in violation of the Act.

Additionally, I have found that Leone suggested to Kugel that she report back to him on the conversations at her luncheon meeting with the union officials, and the next day asked her about what transpired at such luncheon, and Kugel informed him of exactly what was said by each agent. By this conduct of Leone, Respondent has actually engaged in surveillance of the union activities of its employees. *B.L.K. Steel, Inc.*, 245 NLRB 1347 (1979).

I have also found above that both Gil and Leone on October 10 told Kugel not to sign a card for the Union. An employer is free to noncoercively convince his employees that it was against their interest to execute authorization cards, but cannot order them to refrain from doing so.³⁸ It is clear that in the instant matter Respondent was ordering and instructing Kugel not to execute authorization cards. Accordingly, I find that by this conduct it has violated Section 8(a)(1) of the Act.³⁹

I also find that Respondent violated Section 8(a)(1) of the Act by Gil's comments to Kugel in October, that if she did not tell him whether she signed a card, she would never write another stick of business and he would bury her. Similarly, by Gil's remarks to Kugel in

December, that he had saved the job of Kirk, a known union supporter, and that Kirk's job was at stake and that he (Kirk) would therefore not vote for the Union, nor would anyone else on his staff, Respondent has threatened discharge of employees who vote for the Union in violation of Section 8(a)(1) of the Act.

I have also found that Gil, in December, in the course of a discussion with Kugel about Kugel regaining her training allowance, told her that only he and Leone could help her, and that no one else especially the Union could assist her. Gil assured Kugel that she would make it if she stuck with him, not with them. These comments constitute an unlawful promise of benefits to induce Kugel to withdraw her support from the Union, in violation of the Act, and I so find.

I am of the opinion that Gil's December conversation with Tomasetti, on balance, should also be considered an unlawful promise of benefit in violation of the Act. Although his remarks are somewhat confusing, in that he began the discussion by asking Tomasetti if he was loyal to Gil and if he would be willing to vote for the Union, and then went on to promise to Tomasetti a promotion to sales manager, after Tomasetti agreed to do so. However, Gil then told Tomasetti to vote no until further notice, and never got back to him on this subject. Thus it is clear that Gil, by promising him a promotion, was attempting to insure that Tomasetti demonstrate complete loyalty to him by agreeing to vote whichever way Gil believes to be appropriate. Since Gil's last admonition to Tomasetti was to vote no until further notice, I find that Respondent by Gil's conduct has unlawfully promised Tomasetti a promotion to induce him to vote against the Union in violation of the Act.

Finally, I find that by Gil's statements to employees that he wanted no betrayers on his staff and that he was tired of time being wasted on the Union, Respondent has conveyed a message to employees that it equated union activity, a protected statutory right, with employees' disloyalty. This tends to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.⁴⁰

B. The Termination of Kugel

As I have found above, Respondent engaged in an extensive campaign, from October 10 to mid-December, of unlawful intimidation directed towards dissuading its employees from supporting the Union and more particularly from voting for the Union in the December 21 election. The evidence discloses that Kugel was a significant target of Respondent's campaign of such unfair labor practices. Thus, when Respondent became aware on October 10 that Kugel, intending to go to lunch with officials of the Union, they attempted to dissuade her from going, and when that was unsuccessful, unlawfully ordered and instructed her not to sign cards and to report back to Respondent on what was said at the lunch. After the meeting, she was coercively interrogated by Gil about her signing a card and given the impression that

³⁵ It is noted that Tomasetti informed Gil that he felt that Mirante was going to vote for the Union, and Gil replied that Tomasetti was pretty close.

³⁶ *Aitoo Painting Corporation*, 238 NLRB 366 (1978).

³⁷ *International Medication Systems, Ltd.*, 244 NLRB 861 (1979); *W. H. Scott d/b/a Scott's Wood Products*, 242 NLRB 1193 (1979).

³⁸ *Airporter Inn Hotel*, 215 NLRB 824 (1974).

³⁹ *Pilgrim Life Insurance Company*, 249 NLRB 1228 (1980); *Trojan Battery Company*, 207 NLRB 425 (1973); *Robert Meyer Hotel Company, Inc. d/b/a Robert Meyer Hotel*, 154 NLRB 521 (1965).

⁴⁰ *International Union of Operating Engineers, Local 12, AFL-CIO*, 237 NLRB 1556 (1978); *Wilker Bros. Co., Inc.*, 236 NLRB 1371 (1978); *Oscar Enterprises, Inc. OMCO, Inc., Halvin Products, Co.*, 214 NLRB 823 (1974).

her union activities were under surveillance, by Gil's statement that he would be able to find out if she was telling the truth about not signing a card. The next day Gil again created the impression that her activities were under surveillance and threatened that she would never write any more business and that he would bury her, in an attempt to dissuade her from supporting the Union.

That same day Leone stated that he knew Kugel had signed a card, thereby again creating the impression that her union activities were under surveillance by Respondent, and then interrogated her about whether she signed a card. After she denied signing a card, Leone repeated his request made earlier to her, that she relate to him the conversations at her luncheon with union officials. Kugel then complied with Leone's request. By this conduct as noted above, Respondent has engaged in surveillance of union activities of its employees.

Subsequently, Gil unlawfully informed Kugel and other employees that he wanted no betrayers on his staff and equated union activity with disloyalty to Respondent. Later on in early December, Kugel was told by Gil that Kirk's job was safe because he was not going to vote for the Union, thereby constituting a threat of discharge in violation of the Act. Additionally, Gil, in discussing regaining her training allowance, inferred that Leone and Gil would make sure that Kugel obtained it, if she stuck with them and not the Union, thereby unlawfully promising her benefits in violation of Section 8(a)(1) of the Act. Thus it is apparent that Respondent engaged in an intensive unlawful effort to persuade its employees, particularly Kugel, to withdraw their support from the Union and to vote no in the election scheduled for December 21. It also appears that while Respondent was engaging in this conduct, from early October to early December, they were perfectly willing to tolerate Kugel's failure to validate as of October 29 and took no action to terminate her at that time. In fact, to the contrary, Respondent's supervisors during this period continued to praise her work, referred to her as a superstar, and discussed with her the possibility of her making leaders conference. During this period of time, Kugel had continued to insist that she did not sign a card for the Union and in fact reported to Leone, pursuant to his request, on her luncheon conversation with the union officials. Thus, it is apparent that as a result of Kugel's statements in this regard, as well as Respondent's unlawful conduct discussed above, Respondent up until early December believed that Kugel intended to vote against the Union.⁴¹

It is also clear that Respondent was always somewhat skeptical of Kugel's denials of her having signed a card, as evidenced by the remarks of Leone and Gil to her about Respondent having information that she had in fact signed. I find that in early December, when Toma-

setti informed Gil that Kugel had in fact signed a union card and intended to vote for the Union, this confirmed Respondent's suspicions that Kugel had not been telling them the truth about her intentions vis-a-vis the Union and the election, and that Respondent's unlawful threats, promises, and interrogations had not accomplished their intended results of persuading Kugel to vote no in the election.⁴² Gil's response to Tomasetti that he was close in his assessment of the voting intentions of Respondent's employees, further confirms that Respondent as of that time perceived Kugel to be a union supporter and a union vote in the election.

Approximately a week later, on December 14, a week prior to the election, Kugel was terminated by Respondent allegedly for her failure to validate on October 29, some 6 weeks before. Additionally, and very significantly, Respondent terminated Kugel immediately, without affording her 2 weeks' notice, pursuant to Respondent's normal procedures.

Respondent argues that in view of the fact that Kugel was terminated after her third quarter had expired, her case was treated differently than an employee terminated after the second quarter, and that past practice concerning second quarter terminations should not be considered in evaluating Respondent's failure to give Kugel 2 weeks' notice. I do not agree. Respondent's own witnesses testified that generally a terminated employee is given 2 weeks' notice, unless there is a feeling by the district sales manager that the employee would be a disruptive or negative influence. In fact, the only two employees terminated for failure to validate in 1978 were given 2 weeks' notice. There is no basis in the record for Respondent's assertion that terminations for failure to validate after the third quarter should or have been treated any differently with respect to the giving of 2 weeks' notice, than terminations after the second fiscal period. In fact, to the contrary, the record reveals that it is important for Respondent that a sales representative who solicits the business to try to continue with a case and attempt to complete or wrap up the sale. The record furnishes no support for Respondent's assertion that 2 weeks' notice to an employee terminated after the second quarter is given because he could validate during this 2-week period. No testimony was adduced that this is possible, nor that this has been done. In this connection, Respondent also argues that the case of employee Bateman should not be considered as determinative of Respondent's prior practice, as he had been offered the opportunity to be retained and refused to sign Respondent's form 35-0 in order to be able to do so. Respondent argues that therefore Bateman was given 2 weeks' notice for the additional reason that he could have changed his mind during this 2-week period and signed the form and been retained. However, again the record does not support Respondent's assertions. No testimony or other evidence was adduced that Bateman was given the opportunity to

⁴¹ It is also noted that Respondent was very much opposed to the Union's becoming successful in the election and eventually representing the sales representatives. This is further established by Leone's comments as found above, made at sales meetings, concerning his opinion of the Union and the Union's representatives, as well as Respondent's announced decision to phase out the position of sales agents and have all agents become representatives. This action would eventually result in eliminating the Union from representing any of Respondent's employees, unless the Union was successful in the instant or some future election.

⁴² It is also significant to point out that Respondent by Leone's coercive interrogation of Mirante as to his intentions to vote in the election, had successfully persuaded Mirante, whose support for the Union was well known to Respondent, to remain neutral and not to vote in said election.

or could have "changed his mind" and signed the form after a decision had been made to terminate him and he was given a letter so informing him along with 2 weeks' notice of his discharge. Respondent's further argument that there would be no benefit to Respondent or the sales representative by affording Kugel or any employee 2 weeks' notice after the third period is without merit. As noted, there is an obvious benefit for a sales representative to continue processing a case that he or she had been working on to conclusion. In Kugel's case, in fact, at the time that Kugel was terminated, she had a \$100,000 and a \$200,000 policy that she was still processing, and it would have clearly been beneficial to both her and Respondent to have permitted her to continue to work on these cases, and perhaps succeed in finally having these potential policies "wrapped up."

Accordingly, I find that Respondent in the instant case acted contrary to its past practice of affording 2 weeks' notice to employees terminated for failing to validate and has established no justification for failing to do so. The only logical reason that can be ascertained from the record for Respondent's failure to give her 2 weeks' notice, was the fact that the election was scheduled for a week later and that terminating her immediately would make her ineligible to vote.⁴³

From the foregoing, I conclude therefore that General Counsel has made a *prima facie* showing that Kugel's union activity and Respondent's belief that she intended to vote for the union was a motivating factor in Respondent's decision to discharge her.⁴⁴

I find further that Respondent has fallen woefully short of meeting its burden of showing that it would have taken the same action against Kugel in the absence of her union activities and its belief that she intended to vote for the Union. See *Wright Line, supra*.

Respondent alleges that it terminated Kugel pursuant to its unequivocal rule that mandates dismissal for any employee who fails to attain credited commissions of \$3,150 by the end of their third fiscal period. However, as noted, Kugel's third fiscal period expired on October 29, and Respondent failed to terminate her until December 14. In fact not only did Respondent fail to terminate her on October 29 as allegedly required, but nothing was said to her by various supervisors, who were aware of her not validating, about even the possibility of her being discharged. Moreover, as noted, these same supervisors continued during this period to praise her work, call her a superstar, and discuss her possibility for leaders conference.

Respondent attempts to justify its failure to terminate Kugel on October 29, as allegedly mandated, by claiming that Kugel's failure to validate was not "picked up" by District Sales Manager Leone and Regional Supervisor Walsh who were on disability leave at the time.

This purported explanation however has not been substantiated by the evidence of record. It is undisputed that

normally the Home Office initially picks up an individual's failure to validate and thereafter notifies the regional office. In fact the Home Office, in the instant matter, notified the regional office by letter dated December 3 of her failure to attain \$3,150 credits. No evidence was adduced by Respondent to explain why the Home Office failed to issue such a letter in October as allegedly required, and there is no claim of any personnel being unavailable at the Home Office.

Moreover, the evidence revealed that there were other employees in the regional office performing Walsh's functions in her absence. It is noted in this connection that Bill Dobbs, who worked under Walsh and who in fact signed Kugel's original extension, was available and employed by Respondent at the time that Kugel's third period expired. Additionally, Sales Manager Eugene Parsons was acting in Leone's place as acting district sales manager. Parsons and Gil were admittedly aware of Kugel's failure to reach her \$3,150 in commissions by October 29, yet they took no action to terminate her. Leone admitted that, although he was on disability at the time, he was in constant touch with Parsons during the months of October through December, and discussed sales and related matters with him. In fact Leone admitted that he had reviewed Kugel's inventory 2 weeks prior to October 29. Thus I infer from the above, and find contrary to Leone's testimony, that he was fully aware that Kugel had not validated by the end of her third fiscal period, and that he too did not initiate any action to terminate her. In these circumstances, I find that the disability of Walsh and Leone is insufficient to explain Respondent's action in retaining Kugel beyond the expiration of her third fiscal period, in apparent contradiction to its 1975 financing plan.

Respondent points to the terms of its 1975 plan which on its face does seem to mandate termination for employees who do not validate by the end of their third quarter. However, Respondent's own witnesses admit that, notwithstanding the terms of the plan, they did consider whether there were any "extenuating circumstances" present which might justify Kugel's retention. In this connection, it is noted that the correspondence from the Home Office to the regional office in December did not order Kugel's termination, but merely asked to be informed what action will be taken. In addition, the evidence revealed that Katz extended Kugel's second fiscal period by 1 week due to her disability of 3 weeks, although the financing plan contains no provision permitting an extension for such circumstances. Thus it is clear that, despite the apparent rigid and inflexible language of the plan, Respondent's officials are afforded wide discretion in applying the terms of the plan, particularly in regard to whether or not to terminate an individual for failing to reach their production quota.

Thus it becomes necessary to evaluate how Respondent's officials exercised their discretion in deciding upon whether or not there existed sufficient "extenuating circumstances" warranting Kugel's retention.

Katz and Walsh testified categorically that they could not consider the fact that Kugel as of the time of their considering her discharge had placed sufficient amounts

⁴³ It should be noted that the election was perceived by Respondent to be, and was in fact, very close. In fact if Mirante, who as set forth above, was unlawfully persuaded by Leone not to vote, and Kugel, had voted for the Union and had their ballots counted, the Union would have won the election.

⁴⁴ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

of commissions which would have validated her in the next 1960 summary to be issued by the Home Office. In fact this summary which was issued on December 17, 3 days after her termination did establish that she in fact had been officially credited with in excess of \$3,150 in commissions. Katz admitted that had Kugel been officially credited with \$3,150 at the time of his consideration of her discharge, he would not have terminated her, but would have sought higher counsel, even though she had not validated as of October 29. Thus, according to Katz, even though at the time of his consideration of her termination, he was fully aware that the 1960 summary to be next issued by Respondent would show that she had reached her production quota, and notwithstanding the fact that Katz admitted that "not a heck of a lot" of commissions placed are not eventually credited, and that the process from placing to crediting is a purely clerical function, he felt that he had no choice but to terminate her and not to consider these facts as "extenuating circumstances" warranting her retention. I find this testimony to be incredulous⁴⁵ and contrary to logic, as well as contrary to reasonable inferences which I draw from other record evidence.

For example, it is noted that the financing plan itself gives no definition of extenuating circumstances nor does it give any examples of same. Admittedly, policies placed but not credited can be considered in evaluating whether extenuating circumstances are present after the second fiscal period, and in fact were considered when the decision was made to continue Kugel, although she had not validated at that time. No explanation was offered by any of Respondent's witnesses as to why the definition of extenuating circumstances was or should be any different after an employee has completed his or her third fiscal period. In fact, Katz and Walsh both admitted that they had never dealt with a similar situation in the past and could point to no prior examples of where Respondent had acted in a similar fashion in defining extenuating circumstances after the expiration of a sales representative's third fiscal period.

Additionally, although Katz and Walsh as noted testified unequivocally that it is a clear and well-known company policy that extenuating circumstances do not include placed but not credited commissions, none of Respondent's other supervisors were aware of such a rule. Thus, District Sales Manager Leone and Sales Manager Gil all were of the opinion that these factors could be considered in evaluating the existence of extenuating circumstances. In this connection, Gil admitted that he underwent extensive training by Respondent prior to becoming sales manager and testified that this subject was never presented or discussed during this training. Walsh, on the other hand, testified that all of Respondent's management officials are informed of this policy during their training programs. Walsh and Katz further testified that the only example of extenuating circumstances which

would justify retention of Kugel would be an unusual or unwarranted clerical delay in the crediting of her commissions. Notwithstanding the fact that Katz and Walsh testified that they were desirous of doing everything they could to retain a well thought of employee, they admittedly made no effort to ascertain whether, in fact, there was an "unusual or unwarranted" clerical delay in the crediting of any of Kugel's commissions. Nor did any of the other of Respondent's officials such as Leone, Gil, or Parsons, who also purportedly were anxious to retain Kugel, make any effort to ascertain whether any clerical delays at the Home Office, or otherwise, might have caused the crediting of her commissions to be delayed.

Finally, as noted above, Kugel was terminated without the normal 2 weeks' notice, usually afforded to sales representatives in such situations, and no reasonable explanation was offered by Respondent to justify why this action was taken.

Accordingly, based on the foregoing, I find that Respondent has fallen far short of demonstrating that it would have taken the same action against Kugel in the absence of her union activities and in the absence of Respondent's perception that she intended to vote for the Union.⁴⁶ Therefore, I find that Kugel's discharge violated Section 8(a)(1) and (3) of the Act.

IV. THE OBJECTIONS

I have found, as set forth above, that Respondent has violated Section 8(a)(1) of the Act by virtue of various acts of interrogation, threats, promises, creation of the impression and actual engaging in surveillance of the union activities of its employees, instructing and ordering its employees not to sign union cards, and by equating union activity with disloyalty. In addition, I have found that Respondent violated Section 8(a)(1) and (3) of the Act by its termination of Carolyn Kugel.

However, the interrogations and instructions to Kugel not to sign cards, as well as Respondent's comments creating the impression of surveillance made to Kugel and the threat made to her by Gil about her never writing a stick of business all occurred in October, prior to the date the petition was filed. Accordingly, these actions cannot be considered as objectionable conduct.⁴⁷

The remaining unfair labor practices found above, consisting of the discharge of Kugel, the statements equating union activity with disloyalty, creating the impression of surveillance, threatening discharge, promising benefits, and the interrogation of Mirante concerning his intentions to vote, occurred between the filing of petition in November and the date of the election on December 21. These unfair labor practices are more than sufficient to warrant setting aside the election, and I so find. I therefore sustain the Union's objections and shall recommend that the election be set aside and that a new election take place at a time deemed appropriate by the Regional Director.⁴⁸

⁴⁵ Katz testified that even if Kugel had placed commissions valued in excess of \$1 million at the time, if these policies had not been officially credited, again a purely clerical function, he could not consider this as an "extenuating circumstance." I find it difficult to believe that any reasonable businessman would act in such an arbitrary manner, unless there was discriminatory motive involved in such a decision.

⁴⁶ *Wright Line, supra.*

⁴⁷ *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961).

⁴⁸ Respondent has renewed its motion made at the hearing herein to dismiss the objections on the grounds that the Union failed to appear at

Continued

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) of the Act by the following conduct:
 - (a) Coercively interrogating its employees regarding their activities on behalf of and their support for the Union, and concerning their intentions of voting in a National Labor Relations Board election.
 - (b) Creating the impression among its employees that it has engaged in surveillance of their union and other concerted activities.
 - (c) Actually engaging in surveillance of the union activities of its employees.
 - (d) Ordering and instructing its employees not to sign authorization cards for the Union.
 - (e) Threatening its employees with discharge, loss of the right to write business, and other reprisals, if they signed cards or voted for the Union in an National Labor Relations Board election, or if they otherwise assisted or supported the Union.
 - (f) Promising its employees the regaining of their training allowance, promotions to management positions, and other benefits and improvements in their terms and conditions of employment, in order to induce said employees to withdraw their support and assistance to the Union and to vote against the Union in an National Labor Relations Board election.
 - (g) Accusing its employees of betrayal or disloyalty to Respondent by engaging in union activities.
4. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging and refusing to reinstate its employee, Carolyn Kugel, because of her activities on behalf of and support for the Union.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist from engaging in such unfair labor practices and take certain affirmative action provided in the recommended Order below, designed to effectuate the policies of the Act.

Respondent will be required to offer Carolyn Kugel immediate reinstatement to her former position of employment or, if that position no longer exists, to a sub-

the hearing or to present any evidence with respect to its objections. Respondent argues that the Union has an obligation to present a *prima facie* case with respect to the objections and its failure to do so precludes any consideration of the objections filed. However, in the instant case, the objections filed are identical to the unfair labor practices litigated, and General Counsel has adduced all the evidence necessary to establish the objectionable conduct in connection with establishing the unfair labor practice allegations. There is no basis for Respondent's assertion that the proper procedure to have been followed herein was to require the Union to submit its evidence on the objections before General Counsel presented its unfair labor practice evidence. I therefore deny Respondent's motion to dismiss the objections due to the Union failure to appear or to present any evidence.

stantially equivalent position, without prejudice to her seniority or other rights and privileges. I shall further recommend that Respondent make Kugel whole for any loss of earnings she may have suffered by reason of the unlawful discharge, with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid on the amounts owing and to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁴⁹

Upon the foregoing findings of fact, conclusions of law, and the entire record pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁵⁰

The Respondent, Metropolitan Life Insurance Company, Secaucus, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Discouraging or otherwise discriminating against its employees because of their activities on behalf of and support for the Insurance Workers International Union, AFL-CIO, herein called the Union, or any other labor organization.
 - (b) Interrogating its employees regarding their activities on behalf of and their support for the Union, and concerning their intentions of voting in an National Labor Relations Board election.
 - (c) Creating the impression among its employees that it has engaged in surveillance of their Union or other concerted activities.
 - (d) Actually engaging in surveillance of the Union or other concerted activities of its employees.
 - (e) Ordering and instructing its employees not to sign authorization cards for the Union.
 - (f) Threatening its employees with discharge, loss of the right to write business, or other reprisals, if they sign cards or voted for the Union in an National Labor Relations Board election, or if they otherwise assist or support the Union.
 - (g) Promising its employees the regaining of their training allowance, promotions to management positions, and other benefits and improvements in their terms and conditions of employment, in order to induce said employees to withdraw their support and assistance to the Union or to vote against the Union in an National Labor Relations Board election.
 - (h) Accusing its employees of betrayal or disloyalty to it by engaging in union activities.
 - (i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

⁴⁹ See, generally, *Isis Plumbing & Heating Co.*, 139 NLRB 716 (1962).

⁵⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer to Carolyn Kugel immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due.

(c) Post at its place of business in Secaucus, New Jersey, copies of the attached notice marked "Appendix A."⁵¹ Copies of the notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election conducted on December 21, 1979, in Case 22-RC-8051, be set aside and that said case be remanded to the Regional Director for Region 22 to conduct a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

⁵¹ In the event that this Order is enforced by a Judgement of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After hearing in which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose for collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all of these activities.

WE WILL NOT discourage or otherwise discriminate against our employees to discourage membership in Insurance Workers International Union, AFL-CIO, herein called the Union, or any other labor organization.

WE WILL NOT interrogate our employees regarding their activities on behalf of or their support for the Union, or concerning their intentions of voting in an National Labor Relations Board election.

WE WILL NOT create the impression among our employees that we have engaged in surveillance of their union or other concerted activities.

WE WILL NOT actually engage in surveillance of the union activities of our employees.

WE WILL NOT order or instruct our employees not to sign authorization cards for the Union.

WE WILL NOT threaten our employees with discharge, loss of the right to write business, or other reprisals, if they sign cards or vote for the Union in an National Labor Relations Board election, or if they otherwise assist or support the Union.

WE WILL NOT promise our employees the regaining of their training allowance, promotions to management positions, or other benefits or improvements in their terms and conditions of employment, in order to induce said employees to withdraw their support and assistance to the Union or to vote against the Union in an National Labor Relations Board election.

WE WILL NOT accuse our employees of betrayal or disloyalty to us by engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Carolyn Kugel immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent positions, without prejudice to her seniority or other rights and privileges, and WE WILL compensate her with interest for any loss of pay she may have suffered because we terminated her.

METROPOLITAN LIFE INSURANCE COMPANY